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RALPH J. MOORE, JR.



December 18, 2000

By Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

Re: Major Rail Consolidation Procedures
STB Ex Parte No. 582 (Sub-No.1)

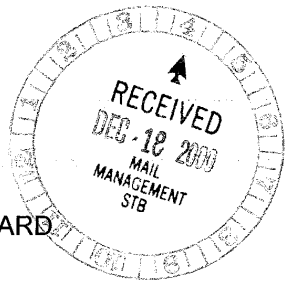
Dear Mr. Williams:

Enclosed for filing in the above-referenced docket are the original and 25 hard copies of the Reply Comments of the National Railway Labor Conference, as well as a copy on a 3.5 inch IBM-compatible floppy diskette in WordPerfect 7/8/9 format.

Very truly yours,

Ralph J. Moore, Jr.

RJM/daw
enclosures
cc: all parties of record




BEFORE THE SURFACE TRANSPORTATION BOARD

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STB EX PARTE NO. 582 (SUB-NO. 1)

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MAJOR RAIL CONSOLIDATION PROCEDURES

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**REPLY COMMENTS OF THE NATIONAL RAILWAY LABOR CONFERENCE**

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December 18, 2000

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**REPLY COMMENTS OF THE NATIONAL RAILWAY LABOR CONFERENCE**

The National Railway Labor Conference ("NRLC") submits these reply comments on the Notice of Proposed Rulemaking ("NPR") in response to comments on modification of collective bargaining agreements ("CBAs") and related matters submitted by the Rail Labor Division of the Transportation Trades Department, AFL-CIO ("RLD"), the Allied Rail Unions ("ARU"), and the Department of Transportation ("DOT").[1/]

RLD and ARU both complain that the third sentence of proposed § 1180.1(e), which states that the Board will look with "extreme disfavor" on modification of CBAs under 49 U.S.C. §§ 11321(a) and 11326(a), would make no change in the "status quo." RLD Comments on NPR at 8; ARU Comments on NPR at 2. Of course, as we noted in our opening comments, the Board cannot make any change in the statutory status quo (and we assume none was intended) because regulatory agencies do not have authority to rewrite statutes. We contended, however, that the third sentence should be deleted because its wording might mislead arbitrators and parties to conclude that the Board had substituted a new and different standard for the statutory standard. But RLD and ARU would have the Board do just that: they ask the Board to "end" what they call "cram-down" by removing CBAs from the pre-emptive scope of §§ 11321(a) and 11326(a) administratively, thereby relegating carriers to the protracted procedures of the Washington Job Protection Agreement ("WJPA") or the almost interminable

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1/ Like the NRLC's opening comments, these reply comments are filed on behalf of the National Carriers' Conference Committee ("NCCC") and all members of the NRLC, except the U.S. affiliates of Canadian National Railway. Contrary to some confusion about the matter (see DOT Comments at 16 n.9), all Class I railroads and many smaller railroads in the U.S. are members of the NRLC.

procedures of the Railway Labor Act ("RLA") to pursue modifications of CBAs that are necessary to implement mergers. DOT asks the Board to revise the "necessity" standard for modifications of CBAs in ways that would have much the same effect: DOT would have the Board draw an artificial line between "obstacles" to implementation and "burdens" that impede implementation, and preclude modifications after consummation of the "immediate transaction under consideration" by the Board. As we show below, these proposals would thwart implementation of mergers that the Board approves in the public interest, defeating their public transportation benefits, and are contrary to law.[2/]

## I. Ending Modification of CBAs Would be Contrary to Law And Would Defeat the Public Transportation Benefits of Approved Mergers

RLD and ARU ask the Board to "end" the modification of CBAs under §§ 11231(a) and 11326(a). ARU Comments on NPR at 5. As RLD says, the "Board must adopt a clear policy – that policy must be that cramdown is dead." RLD Comments on NPR at 11. That demand is flatly contrary to the plain language of § 11321(a), which exempts carriers participating in a merger approved by the Board

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2/ RLD also renews its request that the Board amend *New York Dock* to allow employees whose jobs are relocated more than 30 miles from their original locations due to a merger to draw dismissal allowances rather than follow their work and to require carriers to provide test-period averages to any employees who request them during implementing procedures, before employees have been determined to be adversely affected. RLD Comments at 11-13. The Board has not proposed any rules on these matters, and we assume that if it should decide to do so, it will give the parties notice and the opportunity to comment in accordance with the Administrative Procedure Act. 5 U.S.C. § 553. We note that RLD makes no new arguments in support of its proposals regarding these matters, which we have addressed in our prior comments. As we have shown, RLD's proposals are unwarranted and have been rejected by the Board and the ICC in recent cases. See NRLC Comments on NPR at 8-11; NRLC Reply Comments on ANPR at 19-22. Accordingly, we will not comment further on these proposals in this reply.

from "*all* other law . . . as necessary to . . . carry out the transaction." (emphasis added). The Supreme Court has held that this plain language "means what it says: A carrier is exempt from all law as necessary to carry out an ICC-approved transaction," including the RLA, which is the law that "gives force" to CBAs. *Norfolk & Western R. Co.* v. *Train Dispatchers*, 499 U.S. 117, 129, 131-33 (1991)("*Dispatchers*"). The Supreme Court in that case took pains to point out that it was affirming the ICC's interpretation of former § 11341(a) "not out of deference" but "rather because the Commission's interpretation is the correct one." *Id.* at 133-134. Adoption of the RLD/ARU proposal would flout both the statute and the Supreme Court's holding.

Adoption of that proposal would also be contrary to § 11326(a), which embodies the congressional intent to balance the right given to carriers to obtain modifications of CBAs necessary to implement consolidations with the grant of uniquely generous labor protection benefits to adversely affected employees. See *Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 173-74 (1961); *Southern Ry. – Control – Central of Georgia Ry.*, 331 I.C.C. 151, 159 (1967); NRLC Comments on ANPR at 5-7. RLD and ARU would have the carriers continue to pay the full panoply of labor protection benefits now required (and then some) but deny carriers the *quid pro quo* that justified such extraordinary benefits in the first place. There is no justification for that.[3/]

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3/ RLD's relocation proposal would allow employees to collect protection payments while refusing to follow their work more than 30 miles, which would increase the number of employees entitled to protection and thus the amount the carriers pay and may impede transactions by denying carriers qualified employees needed at consolidated work locations.

When Congress enacted the ICC Termination Act of 1995, it was aware of the ICC's longstanding policy with respect to modification of CBAs under the predecessors of §§ 11321(a) and 11326(a). Yet Congress re-enacted those provisions in the Termination Act without substantive change as to mergers involving Class I carriers. See NRLC Comments on NPR at 3-4. Because of that congressional ratification, the Board is "not now free" to "read a new and more restrictive meaning into" those provisions. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 289 (1974)(citation omitted).

Most importantly, adoption of the RLD /ARU proposal would thwart implementation of mergers approved by the Board and defeat their public transportation benefits. ARU asserts that modifications of CBAs "can no longer be said to be necessary to the carrying-out of any major consolidation" because ARU speculates that all future major mergers will be purely end-to-end. ARU Comments on NPR at 4-5. That would be no justification for administrative repeal of the current statutory regime, which already precludes unnecessary modifications of CBAs. It seems doubtful to us, in any event, that even transcontinental mergers would be purely end-to-end, and ARU's assertion that CBA modifications are never necessary in end-to-end mergers is simply wrong. For example, there may be duplicative locomotive distribution facilities, as there were in the *Dispatchers* case; duplicative dispatching facilities and duplicative car and locomotive repair shops; and no merged carrier needs two or more corporate headquarters. Significant public transportation benefits of mergers could derive from consolidation of such duplicative facilities. Moreover, work may need to be consolidated even when facilities are not closed. Consolidation fosters an "efficient rail transportation system" and the "sound economic conditions" in the railroad industry that

facilitate "effective competition." 49 U.S.C. § 10101(3), (5). Although RLD and ARU seek to dismiss these gains as serving only the private interests of carriers, Congress has declared them to be goals of the National Rail Transportation Policy, *id.*, and the District of Columbia Circuit has held that they are public transportation benefits that justify modifications of CBAs. *RLEA* v. *United States*, 987 F.2d 806, 815 (D.C. Cir. 1993).

As we have demonstrated in our prior comments, some modifications of CBAs are necessary in virtually all consolidations. This is not a matter of mere convenience or efficiency for carriers: What is at stake is whether or not the operations can be effectively consolidated. If CBAs could stand in the way of consolidation – for example, if pre-merger separate local scope and seniority rules kept merged carriers' work-forces separate, as though they still worked for formerly separate carriers – mergers would be reduced to paper transactions and significant public transportation benefits would be lost.

That would be the result if the Board adopted the RLD/ARU proposal. Carriers would be relegated to the long and drawn out major dispute procedures of the RLA to seek modifications of CBAs in mergers, with no mandatory arbitrary mechanism, leaving unions free to strike to prevent implementation.[4/] The Supreme Court thus concluded in *Dispatchers* that:

> "If [§ 11321(a)] did not apply to bargaining agreements enforceable under the RLA, rail carrier consolidations would be

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4/ *Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969); *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969); *Railway Clerks* v. *Florida E. C. R. Co.*, 384 U.S. 238, 246 (1966).

> difficult, if not impossible, to achieve. The resolution process for major disputes under the RLA would so delay the proposed transfer of operations that any efficiencies the carriers sought would be defeated. . . . *The immunity provision of [§ 11321(a)] is designed to avoid this result.*" 499 U.S. at 133 (emphasis added and citations omitted).

## II. RLD's WJPA Proposal Would Frustrate Implementation Of Consolidations and Defeat their Public Transportation Benefits

RLD suggests that the WJPA of 1936 would provide a satisfactory negotiated procedure for carriers to obtain CBA modifications and asks that the Board "expressly" subject the implementation of mergers to the WJPA rather than *New York Dock*. RLD Comments on NPR at 9-10. As we have previously explained, the WJPA, like *New York Dock*, required that an implementing agreement be reached, either through negotiation or arbitration, before a consolidation could be implemented. But unlike *New York Dock*, the WJPA provided no deadlines for completion of the negotiation and arbitration procedures, and imposed no deadline for the Section 13 arbitration Committee to render its award once a case reached it. Thus, as union counsel pointed out during hearings on the ICC Termination Act, when consideration was given to repealing *New York Dock* and leaving implementation of mergers to the WJPA, "it sometimes took years" for the § 13 Committee to render awards. *Disposition of the Railroad Authority of the Interstate Commerce Commission: Hearings Before the Subcomm. on Railroads of the House of Representatives Comm. on Transportation and Infrastructure*, 104th Cong., 1st Sess. at 181 (1995)(question by Rep. Susan Molinari and response by William G. Mahoney, Esq.).

Congress wisely chose not to roll back the clock and leave major rail consolidations to the WJPA. In *New York Dock* the ICC rejected the WJPA's protracted implementing procedures and imposed new ones with deadlines on all phases of the process, to ensure that merger transactions and realization of their public transportation benefits would not be delayed "unduly"; significantly, rail labor raised no objections to these deadlines. *New York Dock Ry. – Control – Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 65, 71 (1979), *aff'd sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979). For the Board to do what Congress declined to do would be inappropriate and contrary to the public interest, because the delay inherent in the WJPA procedures would have much the same result as subjecting implementation of consolidations to the RLA: many public transportation benefits would be lost.

But that is not all that is wrong with RLD's WJPA proposal. The WJPA provides that any party can withdraw on one year's notice to the other parties. If the Board adopted RLD's proposal to make mergers subject to the WJPA as a private agreement, and the unions successfully withdrew from the WJPA, carriers would be relegated to the RLA's procedures to seek any modifications of CBAs necessary to implement mergers. That would be flatly inconsistent with §§ 11321(a) and 11326(a) and the Supreme Court's holding in *Dispatchers*.[5/]

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5/ Given the one-year withdrawal provision of the WJPA, RLD's proposal to relegate the parties to the WJPA calls to mind the comment of Mr. Justice Clark in *Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960):

> "Everyone knows what the answer of the union will be. It is like the suitor who, when seeking the hand of a young lady, was told by her to 'go to father.' But, as the parody goes, 'She knew that he knew that her father was dead; she knew that he knew what

## III. DOT's Proposal to Revise the "Necessity" Standard Is Contrary to Law and the Public Interest

DOT claims that there is a "long-debated" dispute over the necessity standard under §§ 11321(a) and 11326(a) that cries out for Board resolution. In fact, however, as the Board recognized in its recent decision in the *Carmen III* case, the issue of what constitutes "necessity" for modifying a CBA under §§ 11321(a) or 11326(a) has been "resolved" by a series of decisions of the District of Columbia Circuit holding that a modification is "necessary" if it will permit implementation of a consolidation-related transaction that will yield a transportation benefit to the public. *CSX Corp. – Control – Chessie Systems, Inc.*, STB Finance Docket No. 28905 (Sub-No. 22) at 30-31 (served Sept. 25, 1998); see *UTU* v. *STB*, 108 F.3d 1425, 1431 (D.C. Cir. 1997); *American Train Dispatchers Ass'n* v. *ICC*, 26 F.3d 1157, 1163-64 (D.C. Cir.1994); *RLEA* v. *United States, supra*, 987 F.2d at 815 (D.C. Cir. 1993). Modifications are permitted only to realize public transportation benefits that "would not be available if the CBA were left in place, not merely to transfer wealth from employees to their employer." *RLEA* v. *United States*, 987 F.2d at 815.

DOT asks the Board to ignore this law and revise the necessity standard to "bring it in line with" what DOT suggests is a different standard used by the Fifth Circuit's decision in *City of Palestine* v. *United States*, 559 F.2d 408 (5th Cir. 1977), *cert denied sub nom. Missouri Pacific R. Co.* v. *Palestine*, 435 U.S. 950 (1978). DOT apparently believes that under the *City of Palestine* "standard," the public transportation

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a life he had led; and she knew that he knew what she meant when she said "go to father."'" *Id.* at 344 (Clark, J., dissenting).

benefits to be achieved through operational implementation of a merger would be ignored and CBAs could be modified only if they impose "clear" obstacles to consummation of the merger, as opposed to burdens that impede implementation. DOT Comments on NPR at 14-15.[6/] If *City of Palestine* had applied a standard different from the one the District of Columbia Circuit approved in its recent cases, the Board should follow the District of Columbia Circuit, as it did in *Carmen III*, not the Fifth Circuit.

But in fact *City of Palestine* provides no support for DOT's argument. In that case, the Fifth Circuit held only that under the statutory necessity standard – which the court quoted without embellishment as the governing standard (559 F.2d at 413) – the ICC could not abrogate a contract that was "not germane to the success" of the transaction. *Id.* at 414. The transaction at issue in *City of Palestine* was not a true operational merger but "merely a 'corporate simplification' designed to bring two near-wholly owned subsidiaries under the banner of the parent company." *Id.* The three railroads had already "operated as one system for several years," *id.*, and as the ICC had explained in its decision in the case, the proposed merger did not involve "significant changes in the pattern of operation of" the railroads. *Missouri Pacific R.R. – Merger – The Texas & Pacific Ry. and Chicago & E. I. R.R.*, 348 I.C.C. 414, 419 (1976). Rather,

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6/ DOT cites the Reply Comments of the Transportation International Union ("TCIU") filed June 5, 2000, which (at 3) advocated the line between "obstacles" and "burdens." TCIU did not continue to press that proposal in its comments on the NPR. See Comments of the Transportation Communications International Union, *et al.*, filed November 17, 2000.

> "[t]he proposed merger is nothing more than a consolidation of the corporate identities of the three applicant railroads . . . [and] unlike a proceeding where one railroad seeks to merge with another unaffiliated railroad . . . will not result in the customary significant economies involved in the eliminations of duplicate departments." *Id.*

Nonetheless, the ICC ruled that former § 5(11) of the Interstate Commerce Act exempted the parent carrier from an agreement it had made with the City of Palestine, Texas 22 years earlier to keep 4.5 % of certain employees in that city. *Id.* at 430; *City of Palestine*, 559 F.2d at 411-12. The ICC overrode the Palestine agreement not because it would interfere with implementation of the corporate simplification, but merely because the ICC viewed the contract as a burden on interstate commerce. *Missouri Pacific*, 348 I.C.C. at 430.

The Fifth Circuit reversed on the ground that the Palestine agreement did not threaten the success of the "corporate simplification," which the court viewed as a paper transaction. 559 F.2d at 414-15. The court did not hold that "burdens" on implementation are irrelevant to application of the statute exempting carriers from all other law as necessary to carry out mergers. And the court certainly did not hold that realization of public transportation benefits that can be achieved by merged operations are irrelevant to the statute. The Court simply held that agreements that may "burden" interstate commerce generally but do not impede implementation of an approved transaction are not within the statute's reach: "Congress allowed the ICC significant power to effectuate approved transactions, but it did not authorize gratuitous destruction of contractual relations – even when it serves the public interest – when the destruction is *irrelevant to the success of approved transactions*." *Id.* at 415 (emphasis

added). This holding is fully compatible with the Board's current *Carmen III* and District of Columbia Circuit necessity standard.

In the case of mergers of unaffiliated carriers, the ability, over time, to consolidate operations so as to achieve public transportation benefits is clearly relevant to the "success" of those transactions, because such benefits are the very object of those transactions. Adopting a new necessity standard that would deny modifications of CBAs to realize transportation benefits that are *relevant to* and indeed *essential to* the success of mergers would be contrary to the public interest.

DOT also proposes that the Board "further limit" modifications of CBAs by permitting them only in the context of "the immediate transaction under consideration," *i.e.*, the initial consummation of a merger. That proposal runs afoul of " the proper and court-approved interpretation of the word *transaction. . .* as used in [§§ 11321(a) and 11326(a]," which "embrace[s] two categories of transactions: the principal transaction approved by the [Board] . . . and subsequent transactions that [are] directly related to and grew out of, or flowed from, that principal transaction." *CSX Corp. – Control – Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, Finance Docket No. 28905 (Sub-No. 22) at 24 (STB served Sept. 25, 1998); see *UTU* v. *STB*, *supra*,108 F.3d at 1431; *American Train Dispatchers Ass'n* v. *ICC*, *supra*, 26 F.3d at 1165. *New York Dock* itself defines "transaction" to "encompass not only the initial transaction which requires Commission approval but also future related actions made pursuant to that approval"; indeed, this definition was proposed by the Railway Labor Executives Association on behalf of the unions now represented by RLD and ARU in order to require notice and allow employees to claim six years of labor protection benefits for

events related to mergers that occur well after a merger is consummated. See *New York Dock Ry.*, 360 I.C.C. at 70, 76, 84.

There has never been a "deadline on making merger-related operational changes" or on modifications of CBAs necessary to accomplish those changes, and "[i]f anything, the gradual nature of the merger [is] more likely to benefit employees by providing for a smoother integration of personnel into the merged system." *CSX Corp. – Control – Chessie System, Inc.*, 10 I.C.C.2d 831, 842-43 (1995), *aff'd*, *UTU* v. *STB*, *supra*, 108 F.2d at 1431. Indeed, major rail mergers cannot be implemented all at once, nor should they be. To try to force carriers to foresee and accomplish all consolidation of operations in one fell swoop at the outset of a merger could have serious service implications. After the initial consolidation, further steps may emerge that would yield substantial public transportation benefits. DOT's proposal would snuff out these transportation benefits by allowing CBAs to stand in the way of post-consummation implementation of approved mergers, leaving the carriers to the RLA to seek changes and granting unions the power to strike to veto implementation. *Dispatchers*, 499 U.S. at 133. That proposal is not in the public interest and cannot be reconciled with §§ 11321(a) and 11326(a).

## IV. Negotiations with Other Unions

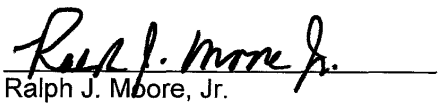
The NRLC and the NCCC are encouraged by the tone of the comments of the TCIU, International Association of Machinists, International Brotherhood of Electrical Workers, and American Train Dispatchers Department of the Brotherhood of Locomotive Engineers, who say that they are willing to attempt to negotiate a voluntary agreement to resolve the contract modification issue, as the largest union, the UTU, has done. The NCCC is likewise committed to attempting to reach such agreements.

Voluntary agreements, as we have noted, provide the best hope for an appropriate resolution of this dispute.

**CONCLUSION**

The contract modification proposals of RLD, ARU, and DOT are contrary to law and would defeat the public transportation benefits of approved mergers. Those proposals would destroy the efficiencies and success of transactions that other parts of the proposed new rules are intended to further. Those proposals should be rejected.

Respectfully submitted,



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*Attorneys for the National Railway Labor Conference*

December 18, 2000

**CERTIFICATE OF SERVICE**

I certify that I have this 18th day of December, 2000, served the foregoing Reply Comments of the National Railway Labor Conference by causing copies thereof to be delivered by first-class mail to all parties on the service list.

Eugenia Langan

Eugenia Langan